

15 U.S.C. § 2607(e). Respondent's failure to comply with section 8(e)'s mandatory reporting duty constitutes an unlawful act under TSCA section 15(3)(B), which states it is unlawful for any person "to fail or refuse to submit reports, notices, or other information" required by TSCA, and subjects Respondent to civil penalties pursuant to TSCA section 16. Compl. ¶¶ 50-51 and Compl. at 10 (citing 15 U.S.C. §§ 2614(3)(B), 2615).

Congress adopted the mandatory statutory reporting requirement at section 8(e) as an integral part of TSCA's "early warning system" to ensure that EPA and the public are timely apprised of chemical hazards. The report at issue –the Modern Four Plant Report²– fills a critical data gap in the scientific understanding of the health effects of occupational exposure to hexavalent chromium in modern chromium production plants like Elementis' facility. Compl. ¶¶ 28, 43-48. The Modern Four Plant Report contains information which reasonably supports the conclusion that hexavalent chromium exposure presents a substantial risk of injury to the health of workers in modern facilities. Consequently, Respondent had a mandatory statutory duty to immediately inform the Administrator of the report under section 8(e) of TSCA.

Respondent has brought a Motion seeking an order dismissing EPA's September 2, 2010 Complaint and Notice of Opportunity for Hearing (Complaint) with prejudice on the ground that the Agency's TSCA section 8(e) claim is time-barred by the general federal five-year statute of limitations at 28 U.S.C. § 2462. Resp't Mot ¶¶ 5, 7. Respondent's Motion is predicated on the alleged failure to state a claim upon which relief may be granted, which is based on a defense of limitations. Resp't Memorandum at 3-5. As discussed below, EPA has properly pleaded its case and the Agency has filed the Complaint within the applicable statute of limitations. Therefore, Respondent's Motion should be denied.

² In the Complaint, the report at issue is referred to as the "Final Four Plant Report." See, e.g., Complaint ¶ 41. In motions and argument before this tribunal, we will use the term, "Modern Four Plant Report" or "Modern Report," because it more accurately and succinctly reflects the subject of the industry-commissioned study, that is, occupational exposure to hexavalent chromium in modern chromium production facilities utilizing the newer low-lime or no-lime kiln manufacturing processes.

II. STANDARD OF REVIEW

Respondent brought its Motion pursuant to section 22.16(a) of the Consolidated Rules of Practice governing general motion practice in EPA administrative proceedings. Respondent likens its Motion to a motion to dismiss for failure to state a claim upon which relief may be granted. See Resp't Memorandum at 3. The Consolidated Rules of Practice do not explicitly recognize motions for judgment on the pleadings; however, both section 22.20 of the Consolidated Rules of Practice³ and Rule 12(b)(6) of the Federal Rules of Civil Procedure (FRCP) recognize motions to dismiss.

While the FRCP are not binding in administrative proceedings under Part 22, the Environmental Appeals Board (EAB) has found them to be instructive in analyzing motions to dismiss. In Re: Commercial Cartage Co., Inc., 5 E.A.D. 112, 117 n.9 (EAB 1994). Under the FRCP, the standard of review for a motion to dismiss provides that the facts alleged in the complaint should be presumed true and construed in the light most favorable to complainant. Id. at 117; see also Ashcroft v. Iqbal, 129 S.Ct. 1937, 1950, 556 U.S. ____ (2009); Vila v. Inter-American Inv. Corp., 570 F.3d 274, 290 (D.C. Cir. 2009). A complainant must plead "only enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007), abrogating Conley v. Gibson, 355 U.S. 41 (1957). "The threshold of sufficiency that a complaint must meet to survive a motion to dismiss for failure to state a claim is . . . 'exceedingly low.'" Ancata v. Prison Health Servs., Inc., 769 F.2d 700, 703 (11th Cir. 1985) (citing Quality Foods de Centro America, S.A. v. Latin American Agribusiness Devel., 711 F.2d 989, 995 (11th Cir. 1983)). Thus, in considering Respondent's Motion, the facts alleged

³ Section 22.20 of the Consolidated Rules of Practice provides a Presiding Officer the authority to dismiss a proceeding "without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant." 40 C.F.R. § 22.20(a).

in the Complaint in this matter should be presumed to be true and taken in the light most favorable to Complainant.

III. STATEMENT OF THE FACTS

EPA has classified hexavalent chromium as a known carcinogen. Compl. ¶ 23. Occupational exposure to this carcinogen results from worker inhalation of airborne hexavalent chromium as a dust, fume, or mist. Compl. ¶ 19. Serious adverse health effects have been associated with occupational exposure to hexavalent chromium in the workplace. Id. The primary human health effects from occupational exposure to hexavalent chromium are lung cancer and damage to the nasal epithelia and skin. Compl. ¶ 22.

An extensive body of literature demonstrates a consistent association between hexavalent chromium exposure and elevated respiratory cancer risk. Compl. ¶48. However, this scientific literature predates changing industry practices in the 1950s and 1960s, rendering the scientific understanding unrepresentative of new exposure conditions.⁴ Compl. ¶¶ 28, 48. Historically, the chromium industry had utilized a high-lime kiln manufacturing process to manufacture chromium chemicals. Compl. ¶ 29. The chromium industry changed from the traditional high-lime kiln manufacturing process to low-lime or no-lime to reduce occupational exposure to hexavalent chromium and respiratory cancer risk in modern chromium production facilities. Compl. ¶¶ 28-30, 48. As of the late 1990s, the scientific literature was inconclusive regarding whether the relationship between hexavalent chromium exposure and respiratory cancer still existed after the chromium production industry's change-over to low-lime or no-lime kiln manufacturing processes. Id.

⁴ As of the late 1990s and early 2000s, only a handful of epidemiology studies had been conducted examining the relationship between hexavalent chromium exposure and respiratory cancer risk in modern chromium production facilities (i.e., after changes in the manufacturing process in the 1950s and 1960s). Importantly, these studies were inconclusive due to the small size of the study cohorts, insufficient latency periods, and other limitations. Compl. ¶ 48.

In 1996, the Chrome Coalition, a trade association of manufacturers and users of chromium, embarked on a comprehensive epidemiological study to fill this data gap regarding modern chromium production facilities. The Chrome Coalition, which included Elementis among its members, facilitated the development of a multi-year, multi-plant study to clarify the relationship between hexavalent chromium exposure and respiratory cancer risk among workers in modern plants. Compl. ¶¶ 25-27, 36. The Chrome Coalition hired Industrial Health Foundation, Inc. (IHF) to serve as the third-party administrator of the trade association. Compl. ¶ 31. In 1998, the IHF entered into an agreement for consulting services with Applied Epidemiology, Inc. to conduct the epidemiological study. Compl. ¶¶ 34, 38.

On October 8, 2002, Elementis' then-vice president, Dr. Joel Barnhart, obtained a copy of the Modern Four Plant Report from IHF containing the results of the four-plant epidemiological study. Compl. ¶¶ 41, 42. The Modern Four Plant Report examines occupational exposure to hexavalent chromium among workers at four modern chromium production plants in Germany and the United States including two facilities owned by Elementis, one of which was owned by Elementis at the time of the study. Compl. ¶ 6, 8. The study divided workers in a combined four-plant cohort into three groups of workers by exposure level: the low exposure group (<40 micrograms per liter per year ($\mu\text{g/L-year}$)); the intermediate exposure group (40 $\mu\text{g/L-year}$ to <200 $\mu\text{g/L-year}$); and the high exposure group ($\geq 200 \mu\text{g/L-year}$). Compl. ¶ 44. The Modern Four Plant Report found elevated lung cancer risk among workers at both the high and intermediate exposure levels. Compl. ¶¶ 45, 46.

On August 22, 2008, EPA sent TSCA section 11 subpoenas to Elementis regarding compliance with TSCA section 8(e). Compl. at 11. On November 17, 2008, Elementis submitted a copy of the Modern Four Plant Report to EPA in response to the subpoenas. Id. This marked the first time that Respondent submitted a copy of the Modern Four Plant Report to the Administrator.